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**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM W. WATSON,
Appellant-Petitioner,

VS.

STATE OF INDIANA,
Appellee-Respondent.

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No. 20A03-0701-PC-41

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0605-PC-5

July 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

William W. Watson appeals his sentence after pleading guilty to Dealing in Cocaine, as a Class B felony. He presents the following issues for our review:

1. Whether his guilty plea was made knowingly, intelligently, and voluntarily.
2. Whether he was denied the effective assistance of guilty plea counsel.

We affirm.

FACTS AND PROCEDURAL HISTORY

At least one time prior to his guilty plea, Watson rejected a plea proposal from the State for a Class B felony with an open sentencing term. Thereafter, Watson informed his trial counsel that he would be willing to accept a plea agreement with a “ten-year cap” on his sentence. Appellant’s App. at 205. Watson’s counsel renegotiated with the State, and the State offered an agreement in which Watson “would plead to the open B with the non-binding recommendation from the State with no more than ten years executed.” *Id.* at 225.

After discussing the State’s recommendation with his counsel, on May 30, 2002, Watson pleaded guilty to dealing in cocaine, as a Class B felony. His plea agreement left sentencing open to the trial court’s discretion, and the State made a non-binding recommendation to the court that no more than ten years of Watson’s imposed sentence be ordered executed. At the conclusion of the sentencing hearing, the trial court imposed a fifteen-year sentence with five years suspended.

Watson filed a petition for post-conviction relief alleging that his guilty plea was not knowing, intelligent, or voluntary. In particular, Watson asserted that his guilty plea counsel had “misadvised” him “as to the penal consequences of his plea.” Appellant’s Brief at 5-6. Following a hearing, the post-conviction court denied his petition. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Guilty Plea

Defendants who can show that they were coerced or misled into pleading guilty by the judge, prosecutor, or defense counsel will present colorable claims for relief. State v. Moore, 678 N.E.2d 1258, 1266 (Ind. 1997). In assessing the voluntariness of the plea, we will review all the evidence before the court that heard the defendant’s post-conviction petition, including testimony given at the post-conviction hearing, the transcript of the petitioner’s original sentencing, and any plea agreements or other exhibits which are a part of the record. Id. If the evidence exists to support the post-conviction court’s determination that the guilty plea was voluntary, intelligent, and knowing, we will not reverse. Moffitt v. State, 817 N.E.2d 239, 249 (Ind. Ct. App. 2004), trans. denied.

Watson maintains that he would not have entered into the guilty plea had his defense counsel informed him that the trial court could impose a ten-year executed sentence with five years probation. Rather, Watson argues that he informed his counsel that he would enter a guilty plea only if his total sentence was limited to ten years. However, our review of the record does not support his contention that he was misled by his counsel.

The written plea agreement expressly provides that the term of Watson's sentence "shall be determined by the Court" and that "a Class B Felony carries a standard term of imprisonment of 10 years to which 10 years may be added . . . or to which 4 years may be subtracted." Appellant's App. at 40. During the guilty plea hearing, the trial court thoroughly advised Watson regarding the possible sentence set out in the plea agreement:

THE COURT: [The Plea Agreement] also provides that sentencing will be left to my discretion within the statutory parameters fixed by the legislature. It further provides that the State of Indiana will dismiss any other charges which it has already filed against you arising out of the incident which gave rise to the filing of these charges, and that the State of Indiana will refrain from filing any more charges arising out of that incident so long as the State is presently aware of the existence of such potential charges. Is that your understanding of the terms of the Plea Agreement?

THE DEFENDANT: Yes, sir.

THE COURT: Is that what you want to do?

THE DEFENDANT: Yes, sir.

THE COURT: This Plea Agreement has been reduced to writing. . . . It purports to bear your signature. Did you in fact sign this document?

THE DEFENDANT: Yes, sir.

* * *

THE COURT: Did you read it in its entirety before you signed it?

THE DEFENDANT: Yes, sir.

THE COURT: Did you understand it when you read it?

THE DEFENDANT: Yes, sir.

THE COURT: Did you have an opportunity to review it with Mr. Garcia, your lawyer, before you signed it?

THE DEFENDANT: Yes, sir.

THE COURT: Are you satisfied with the advice, counsel, and representation provided you in this case by Mr. Garcia?

THE DEFENDANT: Yes, sir.

THE COURT: Is there anything which you believe Mr. Garcia should have done for you that he did not do?

THE DEFENDANT: No, sir.

THE COURT: Turning your attention again to this Plea Agreement, did anyone offer you anything of value other than the benefits which you received pursuant to the Agreement itself in order to induce you to enter into this Plea Agreement?

THE DEFENDANT: No, sir.

* * *

THE COURT: [S]ince this Plea Agreement does not limit my discretion with regard to sentencing, if you will provide me with an adequate factual basis for your offer of plea, I will accept that plea today.

Id. at 44-46, 55. At the conclusion of the sentencing hearing, Watson thanked the trial court for the sentence imposed.

In addition, during the post-conviction hearing Watson's defense counsel testified that the State had agreed to make a non-binding recommendation to the court that no more than ten years of any sentence imposed be ordered executed. Watson's counsel also stated that "he made it clear to the defendant that the State's recommendation was not binding on the court." Id. at 248. The State made its recommendation during the sentencing hearing, and the court ordered only ten years executed.

The colloquy between the trial court and Watson, and the testimony of Watson's counsel, demonstrates that Watson was aware that, by pleading guilty, the trial court had discretion in imposing his sentence. Accordingly, the post-conviction court did not err when it found that Watson voluntarily, intentionally, and knowingly entered into the guilty plea.

Still, Watson maintains that, in informing his trial counsel that he would plead guilty if given a "ten-year cap," he was referring to his total sentence. Appellant's Brief at 11. But the only evidence to support Watson's assertion is his self-serving testimony in connection with his earlier repudiation of an open plea to a Class B felony. Because evidence exists to support the post-conviction court's determination that the guilty plea was voluntary, intelligent and knowing, we will not reverse.

Issue Two: Ineffective Assistance of Counsel

Watson also contends that but for his counsel's "misadvice," he would not have pleaded guilty. See id. at 5. As such, he contends that he was denied the effective assistance of guilty plea counsel. We cannot agree.

There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden falls on the defendant to overcome that presumption. Gibson v. State, 709 N.E.2d 11, 13 (Ind. Ct. App. 1999), trans. denied. To make a successful ineffective assistance claim, a defendant must show that: (1) his attorney's performance fell below an objective standard of reasonableness as determined by prevailing professional norms; and (2) the lack of reasonable representation prejudiced him. Mays v. State, 719 N.E.2d 1263, 1265

(Ind. Ct. App. 1999) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)), trans. denied. Even if a defendant establishes that his attorney's acts or omissions were outside the wide range of competent professional assistance, he must also establish that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. See Steele v. State, 536 N.E.2d 292, 293 (Ind. 1989).

For ineffective assistance of counsel claims relating to penal consequences, a petitioner must establish, by objective facts, circumstances that support the conclusion that counsel's errors in advice as to penal consequences were material to the decision to plead. Segura v. State, 749 N.E.2d 496, 507 (Ind. 2001). Merely alleging that the petitioner would not have pleaded is insufficient. Id. Rather, specific facts, in addition to the petitioner's conclusory allegation, must establish an objective, reasonable probability that competent representation would have caused the petitioner not to enter a plea. Id.

Here, again, the only evidence Watson cites to support his assertions is his self-serving testimony in connection with his earlier repudiation of an open plea to a Class B felony. But those facts do not support the conclusion that counsel's purported errors in advice as to penal consequences were material to the decision to plead. Again, defense counsel testified at the post-conviction hearing that "he made it clear to the defendant that the State's recommendation was not binding on the court" before Watson decided to plea. Id. at 248. That testimony does not support Watson's contention that he was misinformed regarding sentencing. Hence, Watson cannot show that his counsel's performance fell below an objective standard of reasonableness. Moreover, Watson's self-serving statements that he interpreted "ten-year cap" to mean a ten-year total

sentence, and that he would not have otherwise pleaded guilty, are insufficient to show that the post-conviction court erred when it ruled on this issue. Watson has failed to establish an objective, reasonable probability that competent representation would have caused him not to enter a plea. See Segura, 749 N.E.2d at 507. Watson has not demonstrated that he was denied the effective assistance of guilty plea counsel.

Affirmed.

RILEY, J., and BARNES, J., concur.